Editor's note: Appealed -- dismissed, Civ.No. 87-379 (D. Alaska Aug. 28, 1990), aff'd, No. 90-35802 (9th Cir., Sept. 16, 1991), 944 F.2d 910 (table); cert denied, S.Ct. No. 91-7783 (June 29, 1992), 112 S.Ct. 3039

HENRIETTA ROBERTS VADEN
v.
BUREAU OF LAND MANAGEMENT ET AL.

IBLA 85-253 Decided March 19, 1987

` Appeal from a decision of Administrative Law Judge L. K. Luoma holding that settlement had been established on lands sought for Indian allotment F-19055.

Reversed.

1. Act of March 4, 1927 -- Grazing Leases: Cancellation or Reduction

   Lands leased under the Act of Mar. 4, 1927, are not subject to settlement, location, and acquisition under the nonmineral land laws applicable to Alaska unless and until the authorized officer determines that the grazing lease should be canceled or reduced.

2. Act of February 8, 1887 -- Alaska: Possessory Rights -- Indians: Lands: Allotments on Public Domain: Settlement -- Settlements on Public Lands

   Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

3. Act of February 8, 1887 -- Alaska: Possessory Rights -- Indians: Lands: Allotments on Public Domain: Settlement -- Settlements on Public Lands

   An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting

> of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the vicinity of the allotment lands, and insubstantial improvements on the land.

APPEARANCES: James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for appellants; Ernest Z. Rehbock, Esq., Anchorage, Alaska, for respondent.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Bureau of Land Management (BLM) and the National Park Service (NPS), United States Department of the Interior, have appealed from a decision of Administrative Law Judge L. K. Luoma, dated November 30, 1984, holding that Henrietta Roberts Vaden had established settlement on a 160-acre tract of land within the exterior boundaries of the Wrangell-St. Elias National Park and Preserve. Judge Luoma's decision was issued following a hearing convened pursuant to a stipulation of the parties. Vaden v. Kleppe, No. A 75-223 (D. Alaska Mar. 31, 1976). 1/

On June 12, 1972, respondent Vaden filed an application for an Indian allotment pursuant to section 4 of the Act of February 8, 1887, 25 U.S.C. § 334 (1982), commonly known as the Dawes Act or the General Allotment Act. Her application, dated December 20, 1971, described 160 acres in unsurveyed SE 1/4 SW 1/4, SW 1/4 SE 1/4, E 1/2 SE 1/4 sec. 24, T. 1 S., R. 20 E., Copper River Meridian, Alaska, and listed the following improvements placed on the land: "21' x 27' cabin, also house, barn, corral, airstrip on contiguous F-76 T.&M." This latter mention of "F-76" refers to a contiguous trade and manufacturing (T&M) site sought by Vaden in the same section. Respondent is a Cherokee Indian and a native of Oklahoma. 2/

Section 4 of the Act of February 8, 1887, provides in relevant part:

> Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are

1/ This case involved judicial review of two orders by this Board in Henrietta Roberts Vaden, IBLA 74-1. The first order, issued on Aug. 8, 1973, dismissed Vaden's appeal for her failure to file a timely statement of reasons. Her appeal was taken from a BLM decision of May 31, 1973, rejecting Indian allotment application F-19055 because the lands sought were not open to settlement. The second order, dated May 29, 1975, denied Vaden's petition for reconsideration.

2/ In Bertha Mae Tabbytite, 72 I.D. 124 (1965), the Department held that a Comanche born in Oklahoma could properly seek lands in Alaska under the Act of Feb. 8, 1887. See also Nagel v. United States, 191 F. 141 (9th Cir. 1911).

> located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this Act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; * * *. [Emphasis supplied.]

BLM and NPS argue that Judge Luoma erred in finding that Vaden had established a settlement of the allotment lands prior to issuance of a grazing lease to her husband on January 1, 1963, and further contend that Vaden's settlement efforts were insufficient to survive the segregative effects of this lease (F-031469), a multiple use classification, two public land orders, and a state selection application. 3/ In order to properly review these arguments, it is necessary to understand what settlement efforts respondent made and when.

The findings below are based on respondent's testimony at a hearing held on May 10 and 12, 1983. Although contradictory evidence was offered by Douglas Vaden, respondent's former husband, Judge Luoma did not accept this testimony, presumably finding respondent a more credible witness. Without the opportunity to observe the demeanor of the witnesses, we too have looked to respondent for the facts in this case and, to a lesser degree, to her children for supplemental information. As set forth infra, the conclusions we draw from these facts differ markedly from those drawn by the Administrative Law Judge.

Respondent's claimed Indian allotment is a 160-acre parcel through which Solo Creek flows before entering White River. Respondent first travelled to the White River valley in August or September of 1959; she spent 4 or 5 hours there on this visit (Tr. 272-73). In January 1960, she spent one-half day in the valley in the company of her husband, her pilot from Northway, and a third gentleman (Tr. 273; Exh. F-1). In the summer of 1960, respondent made brief overnight visits to her 12-year-old son Tom who was spending the entire summer in the area (Tr. 274). Depending on the whereabouts of Harold Nickels, a family acquaintance who brought Tom into the area that summer, Tom spent his nights on the T&M site or elsewhere (Tr. 97-98). 4/ In the summer of 1961, respondent again made brief visits to her son at Solo Creek, approximately once every 3 weeks (Tr. 275). Respondent spent the month of August at Solo Creek in 1962, staying overnight on the nearby T&M site one-half of the time (Tr. 276). The remaining nights were spent in a pre-existing cabin in the cottonwoods on the Indian allotment. Id. 5/ Since

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3/ More specifically, the Copper River multiple use classification (AA-2779, F-955), 33 FR 19957 (Dec. 28, 1968); Public Land Order Nos. 4582 and 5180, 34 FR 1025 (Jan. 23, 1969), 37 FR 5583 (Mar. 16, 1972); and State selection application F-15341, Feb. 1, 1972.

4/ Tom testified that his mother stayed in a tent frame during her initial visits: "The tent consisted of Visqueen. It didn't work as well, the wind blew it apart" (Tr. 73).

5/ In answer to the question whether she had spent the night in the cottonwood cabin since reroofing it, respondent testified, "I have in 1962, and since 1962. Not too often, but I have. I have at least once a year" (Tr. 187).

late August or September of 1962, respondent has taught school in Anchorage for 9 months of each year (Tr. 180). During these months, she resides in a home she owns in Anchorage (Tr. 265-66).

[1] Although respondent's settlement efforts extend well beyond calendar year 1962, we must determine at this point whether, as the Administrative Law Judge found, respondent had established settlement prior to January 1, 1963, the effective date of grazing lease F-031469, or whether, as appellants contend, respondent not only failed to establish settlement but also failed to show sufficient occupancy and possession to prevent the segregative effect of this lease from attaching. This determination is relevant, however, only insofar as respondent's allotment lands are within the area described by the grazing lease. Lands leased, as here, under the Act of March 4, 1927, 43 U.S.C. § 316 (1982), are not subject to settlement, location, or acquisition under the nonmineral public land laws applicable to Alaska unless and until BLM determines that the lease shall be cancelled or reduced. 43 CFR 63.22(a) (1963) (now 43 CFR 4230.1).

Grazing lease F-031469 was entered into on January 1, 1963, between Douglas B. Vaden, respondent's husband, and the United States for a period of 10 years. The following lands were leased: "White River Bar from Russell Glacier to Ping Pong Mountain. Not leased by area." Because the lease was not issued by area, it is not possible to simply list the townships contained in the lease and determine whether the situs of respondent's allotment, SE 1/4 SW 1/4, SW 1/4 SE 1/4, E 1/2 SE 1/4 sec. 24, T. 1 S., R. 20 E., is included therein. Testimony at the hearing was not conclusive. 6/ The record does, however, contain a use plat dated June 30, 1972, showing grazing lease F-031469 occupying the entire T. 1 S., R. 20 E. Moreover, in Henrietta Roberts Vaden, 70 IBLA 171, 176 (1983), this Board expressly found that respondent's T&M site, which is contiguous with her Indian allotment and located wholly within sec. 24, T. 1 S., R. 20 E., was within grazing lease F-031469. 7/ Given the position of the T&M site vis-a-vis the Indian

6/ BLM natural resources specialist Jon Dolak testified that a conflict existed between grazing lease F-031469 and the allotment at issue, but conceded that he had never seen a document that would delineate the area of the grazing lease and show that the allotment would fall within the lease (Tr. 351, 353, 357). Although Exhibit 13, a map captioned "Douglas B. Vaden Grazing Lease F-031469" and prepared by D. Scott in October 1963, appears to be such a document, Dolak could not state that this map was a component part of Vaden's lease commencing Jan. 1, 1963 (Tr. 346, 366). We note that the area occupied by lease F-031469 on Exhibit 13 includes all of sec. 24, T. 1 S., R. 20 E., but is far less extensive than that appearing on the use plat dated June 30, 1972.

7/ Judge Luoma is incorrect in stating that the Board relied on the "more inclusive" land description appearing in Douglas Vaden's 1973 grazing lease in reaching this conclusion. Effective Jan. 1, 1973, Douglas Vaden was issued a second lease, also denoted F-031469, but describing "White River bar and adjacent meadows from the foot of Russell Glacier downstream to Ping Pong Mountain. Not leased by exact acreage." (Emphasis supplied.) The Board, while quoting the more inclusive 1973 land description, relied on a status plat dated Nov. 15, 1966, to conclude that the T&M site was wholly within lease F-031469.

allotment and the location of the White River to the south of each, it would be virtually impossible for the T&M site to be within the grazing lease and the Indian allotment to be outside such lease.

[2] Since we find a conflict between grazing lease F-031469 and the allotment lands, there remains to be evaluated respondent's settlement efforts. Counsel for respondent correctly points out that BLM officials have an obligation under 43 CFR 2091.5 to "ascertain by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements and [to] suspend all applications made by others than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon." 8/ (Emphasis supplied.) The periods during which respondent was present in the Solo Creek area have been set forth above. We now proceed to examine respondent's possession and occupancy of the subject lands during these periods and determine whether they are such as to allow her application to survive the segregative effects of 43 CFR 4230.1.

During respondent's first visit to White River valley in August or September of 1959, she stayed but 4-5 hours. In January 1960, she spent one-half day in the valley. During summer of 1960, she made brief overnight visits to her son who stayed at least part of the time on the T&M site. These visits in 1959 or 1960 caused respondent to select the Solo Creek area for her intended allotment (Tr. 182). Respondent visited her son during the summer of 1961 approximately once every 3 weeks. Only during the summer of 1962 can respondent's stays on the allotment be described as anything other than brief visits. During that summer she stayed for the month of August, and respondent and son reroofed a pre-existing 10' X 12' cabin (the cottonwood cabin) on the allotment lands (Tr. 109, 187). This task took about a day and a half, and when the task was sufficiently complete to prevent disturbance from bears, respondent and son stayed overnight in the cottonwood cabin (Tr. 109, 276). Half of the time during the month of August, respondent stayed overnight in the cottonwood cabin; the remaining nights were on the T&M site. While in the cabin, respondent used the stove and stocked the cabin with food (Tr. 187, 276). During her stay in 1962, respondent and son first attempted to delineate the boundaries of her allotment by walking around the area sought. No posts, fences, or stakes were set to define these boundaries (Tr. 192, 280-81). 9/ A pre-existing tent frame

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8/ Counsel for respondent also cites 43 CFR 2091.6-3. That regulation states: "Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others."

9/ Respondent's testimony in this regard follows:

"Q Did you mark out the boundaries of your Allotment with posts?

"A No. Tom and I just walked around and said, 'This is what Mom is going to get.' That's the way we did it.

"Q Were you able to ascertain the amount of acreage that was involved?

"A No, I wasn't. I knew that they would manage to give me what I told them I want and I knew that I could get help from the [Bureau of Indian Affairs]."

(Tr. 281).

and two runways were also present on the allotment lands (Tr. 98, 115, 222, 281). During the period 1960-62, respondent raised some vegetables in a garden which, because of its shady location among the cottonwoods, "kind of petered out" (Tr. 187-88). The character of the allotment lands may be described as "nonirrigable-grazing" (Exh. 14). During this same period, she hunted, fished, and picked berries to sustain herself (Tr. 189-90). These activities took place on allotment lands (Tr. 190-91). No brush clearing occurred because respondent wanted to keep the cottonwood cabin a secret from her husband (Tr. 188). 10/

In an effort to determine whether respondent's settlement efforts constituted sufficient possession and occupancy of the allotment so as to avoid the segregative effect of 43 CFR 4230.1, counsel have focused upon two cases. The first of these, Cramer v. United States, 261 U.S. 219 (1923), held that lands "fenced and occupied by three Indians for at least seven years before enactment of a statute conveying odd numbered sections of land to a railroad were "reserved * * * or otherwise disposed of," and therefore, a patent conveying said lands was properly cancelled. In Cramer, Indian use and occupancy was described in this manner:

> The court found that as early as 1859 the Indians named lived with their parents upon the lands described and had resided there continuously ever since; that they had under fence between 150 and 175 acres in an irregularly shaped tract, running diagonally through the two sections, portions of which they had irrigated and cultivated; that they had constructed and maintained dwelling houses and divers outbuildings, and had actually resided upon the lands and improved them for the purpose of making for themselves homes. These findings have support

261 U.S. at 226.

The Court found that the action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating, and improving the soil, and establishing fixed homes thereon was in harmony with the Government desire to induce the Indian "to forsake his wandering habits and adopt those of civilized life." Id. at 227. Possessory rights were acquired by these actions, and the fact that such right of occupancy found no recognition in any statute or other formal governmental action was not conclusive. The right, the Court held, flowed from a settled governmental policy. Id. at 229.

Counsel for BLM and NPS emphasizes that the Indians in Cramer fenced the lands occupied by them, cultivated these lands, and improved them. Cases arising from the Act of May 17, 1884, 23 Stat. 24, an act providing for a

10/ Respondent also kept this cabin a secret from the BLM official who spent 2 days in 1976 with respondent walking over the Indian allotment claim (Tr. 266).

civil government for Alaska, are cited by appellants as support for the notion that possessory rights are acquired by use or occupancy that is notorious, exclusive, continuous, and substantial. 11/ In appellants' view, respondent's acts do not rise to these levels.

Respondent's counsel distinguishes Cramer by pointing out that the Indians in Cramer were occupying the land as squatters. In contrast, respondent seeks an allotment under the Dawes Act. Counsel argues Cramer definitely does not spell out specific evidentiary criteria for the exercise of dominion and occupancy.

The second case relied upon by counsel is Navajo Tribe of Indians v. State of Utah, 72 I.D. 361 (1965), remanded for hearing, 12 IBLA 1, 80 I.D. 441 (1973), where the issue posed was whether the Navajos had occupied certain school sections prior to acceptance of survey so as to prevent the vesting of title in the State. BLM and NPS contend that this case is consistent with Cramer because it holds that occupancy should be evidenced by "such matters as the extent of improvements placed on the land in the form of hogans, corrals, fences, etc., the extent of actual residence and the extent of grazing or cultivation." 72 I.D. at 366.

Counsel for respondent reads Navajo Tribe to say that a "lesser degree of occupancy" than that present in Cramer may except respondent's activities from the segregative effect of grazing lease F-031469. 72 I.D. at 365. The evidence shows, counsel contends, that respondent established "the intent to occupy and such actual occupancy as would have 'exceptive effect.'"

Standards for determining whether settlement has been established are not altogether different from the standards discussed above. Although present regulations are silent on the subject, regulation 43 CFR 176.8 (1963), in effect during the timeframe at issue, offers some guidance and employs concepts of use and occupancy:

> (a) The nature, character, and extent of the settlement, as well as the manner in which performed, must be fully set forth in the allotment application. In examining the acts of settlement and determining the intention and good faith of an Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instincts of the race, as well as to the character of the land taken in allotment.
>
> (b) While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely assert a claim to the land based upon the reasonable use or occupation thereof consistent with his mode of life and the character of the land and climate.

11/ United States v. State of Alaska, 201 F. Supp. 796, 799 (D. Alaska 1962), citing United States v. 10.95 Acres of Land, 75 F. Supp. 841, 844 (D. Alaska 1948).

> (c) To enable an Indian allottee to demonstrate his good faith and intention, the issuance of trust patent will be suspended for a period of 2 years from date of settlement; but in those cases where that period has already elapsed at the time of adjudicating the allotment application, and when the evidence, either by the record or upon further investigation in the field, shows the allottee's good faith and intention in the matter of his settlement, trust patents will issue in regular course. [Emphasis supplied.]

Further insight into the concept of settlement is provided in Departmental instructions at 48 L.D. 525 (1922). Contrasting the requirements of the Dawes Act with those of the Homestead Act, Commissioner Spry stated: "The requirements of residence and the amount of cultivation each year and the erection of a habitable house are specific in the [homestead] act and differ greatly from the use and occupancy found sufficient in case of an Indian allotment claim." 12/ (Emphasis supplied.)

Case law makes this same distinction. Thus in Charley Anderson, 47 L.D. 187 (1919), the Department held: "The law contains no requirement of 'actual residence' on the part of an applicant under the fourth section [of the Dawes Act]." See also Frank St. Clair, 52 L.D. 597, 601 (1929), and Sacrestan v. Santa Fe Pacific Railroad Co., 46 L.D. 426, 428 (1918).

[3] We agree with BLM and NPS that respondent's occupancy and possession of the allotment lands claimed were insufficient to prevent the segregative effect of lease F-031469 from attaching to the allotment lands. We further hold, contrary to the Administrative Law Judge, that respondent

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12/ On other occasions, the Department has stressed the similarities shared by these two statutes. Thus in instructions issued Feb. 21, 1903, Secretary Hitchcock stated:

"[I]t must be remembered that settlement, by the very terms of the act, is a prerequisite to allotment under section 4 of the act of February 8, 18
87. It is held that said act is, in its essential elements, a settlement law; and that 'to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement.' Indian Lands -- Allotments (8 L.D. 647). When the evident purpose of the act is considered, the term 'settlement' therein, must inevitably be construed to mean practically the same it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere. While this is true it would seem to be entirely consistent and just, in examining the acts and determining the intention and good faith of an Indian allottee in this respect, to give proper and reasonable regard to the habits, dispositions and nomadic character of the race, and to allow more leniency in applying and enforcing the rule applicable to the white settler. This course would doubtless sufficiently safeguard the purpose of said act."
32 L.D. 17, 18 (1903).

failed to establish settlement before the segregation attached. 13/ Prior to the summer of 1962, respondent was but a visitor to the lands. Her main purpose in coming to the Solo Creek area during the summers of 1960 and 1961 was to visit her son. What evidence the record provides suggests that she occupied the T&M site during these stays. Respondent did not recall how many times she visited her son during the summer of 1960 (Tr. 274). In the summer of 1961, respondent visited her son briefly approximately once every 3 weeks. During the summer of 1962, she spent approximately 15 nights in August on the allotment lands. Although respondent's testimony that she hunted on the allotment was uncontested, she also indicated that this activity occurred elsewhere. Indeed, respondent's documentary evidence indicates that when she hunted for meat, such as caribou, she hunted outside of the allotment lands (Tr. 199, 201; Exhs. F-4, F-5). In an effort to keep her then husband unaware of her desired lands, respondent cleared no brush. In addition, no posts, fences, or stakes were placed on the land during the period prior to 1963. The only physical evidence of occupancy or possession on the allotment lands in January 1963 attributable to respondent was a failed garden and a new roof on the cottonwood cabin. During the period at issue here, the record indicates the contiguous T&M site was the focus of activity for respondent, not the allotment lands.

Section 4 of the Act of February 8, 1887, does not confer upon an Indian a vested right to an allotment of public lands. Martha Head, 48 L.D. 567, 571 (1922). We find that respondent's settlement efforts, prior to January 1, 1963, as evidenced by her short stays and minor improvements, were too brief and insubstantial to qualify as reasonable use and occupancy under the standards enunciated in Cramer, Navajo Tribe, cases arising under the Act of May 17, 1884, and Departmental case law. 14/

13/ Judge Luoma's finding that settlement had in fact occurred in 1962 permitted him to invoke regulation 43 CFR 2212.0-7(a)(3) (1970) in response to appellants' contention that the allotment lands have at best only nominal agricultural and grazing value. That regulation states in part: "Where an Indian makes settlement in good faith upon lands not reserved therefrom, an allotment therefor can not be denied on the ground that the lands are too poor in quality." Judge Luoma's reliance on this regulation is misplaced. As appellants correctly state, this regulation is not inconsistent with the standard that land is available for allotment to Indians only if it is suitable for a home for the Indian and his family, and the return from the use of the land would support the residents. See Saulque v. United States, 663 F.2d 968, 975 (9th Cir. 1981). The authority of the Secretary of the Interior to reject allotment applications for public land that is not an economic unit is well established. Hopkins v. United States, 414 F.2d 468-69 (9th Cir. 1969); Finch v. United States, 387 F.2d 13, 15-16 (10th Cir. 1967); Benjamin F. Sanderson, Sr., 16 IBLA 229, 232 (1974); John B. Balmar, 71 I.D. 66, 67, 68 (1964). For a lucid interpretation of 43 CFR 2212.0-7(a)(3) (1970), see Hopkins v. United States, supra at 469.

14/ Although we cite Cramer with approval, we do not mean to suggest that the case sets minimum standards for such Indian possession and occupancy as will prevent a segregative event from attaching. Cramer does, however, identify relevant considerations, e.g., residence, construction of improvements, irrigation, maintenance, fencing, and cultivation, which although not necessarily required for settlement, will support a finding that an Indian has shown reasonable use and occupancy of a particular tract of land.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed.

John H. Kelly
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE VOGT CONCURRING:

I agree with the majority's reasoning and with the result it reaches. I write separately to call attention to an issue which, given the Board's disposition of the case, is not required to be resolved here but which may require resolution in the future. That is the question whether a member of the Cherokee Nation of Oklahoma, such as appellant, is entitled under any circumstances to an allotment under section 4 of the General Allotment Act (GAA) of February 8, 1887, 25 U.S.C. § 334 (1982).

Section 8 of the GAA, 25 U.S.C. § 339 (1982), excluded the territory of the Cherokee Nation, and certain other tribes, from the provisions of the act. The Act of May 8, 1906, 25 U.S.C. § 349 (1982), amended section 6 of the 1887 act to provide, inter alia, "That the provisions of this Act shall not extend to any Indians in the Indian Territory [then eastern Oklahoma, including the Cherokee Nation]".

The floor debate in the House of Representatives concerning this provision of the 1906 amendment indicates that the members intended the exclusion in the 1906 amendment to parallel the exclusion in the 1887 act but also indicates that they believed the 1887 exclusion was applicable to the Indians residing in the Indian Territory as well as to the lands located there, that is, that the exclusion was personal to the tribes and their members. 40 Cong. Rec. 3600 (1906) (remarks of Reps. Finley, Burke, and Curtis).

That the members of the Cherokee Nation were intended to be excluded from the provisions of the GAA is also indicated by the fact that the Cherokees were allotted under special statutes, e.g., Act of March 1, 1901, 31 Stat. 848; Act of July 1, 1902, 32 Stat. 716, with provisions different from those of the GAA, one distinction being that the Cherokees were to receive their allotments in restricted fee status rather than in trust status as provided in the GAA.

A substantial body of special statutes governing the property and personal rights of the members of the Cherokee Nation and the other eastern Oklahoma tribes collectively known as the Five Civilized Tribes (Choctaw, Chickasaw, Creek, and Seminole) was enacted around the turn of the century. E.g., Act of June 28, 1898, 30 Stat. 495 (Curtis Act); Act of April 26, 1906, 34 Stat. 137. A cursory review of this body of law makes it apparent that Congress did not legislate for these tribes in the same manner it legislated for other tribes, and further reinforces the view that Congress did not intend to include the members of the Five Civilized Tribes within the provisions of the GAA. A more substantial review of the special statutes affecting the Five Civilized Tribes, and their relation to the GAA, will be necessary when and if the Board is required to resolve the issue of the eligibility of a member of one of these tribes for an allotment under 25 U.S.C. § 334.

Anita Vogt
Administrative Judge
Alternate Member.